

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

10 PAUL A. CADROBBI, an individual; } Civil No. 15cv1029 JAH(BGS)  
11 CYNTHIA L. CUMMING, an }  
12 individual, }  
13 v. }  
14 Plaintiffs, }  
15 NATIONSTAR MORTGAGE, L.L.C., a }  
16 Delaware Limited Liability Company; }  
17 OCWEN LOAN SERVICING, LLC, a }  
and DOES I through 100, inclusive, }  
Defendants. }  
ORDER GRANTING DEFENDANT  
NATIONSTAR'S MOTION TO  
DISMISS AND GRANTING  
DEFENDANT OCWEN'S MOTION  
TO DISMISS [Doc. Nos. 5, 7]

## INTRODUCTION

19 On May 8, 2015, Plaintiffs Paul A. Cadrobbi and Cynthia L. Cumming, proceeding  
20 *pro se*, filed a complaint alleging fraud and misrepresentation against Nationstar Mortgage  
21 LLC, Ocwen Loan Servicing LLC, and Does 1 through 100 inclusive. Plaintiffs allege they  
22 entered into a mortgage loan for property located in Oceanside, California and the loan  
23 was subsequently purchased by Defendant Ocwen. Complaint ¶¶ 3, 6, 7. They further  
24 allege Defendant Ocwen allocated their mortgage payments to a nonexistent PMI policy  
25 and failed to provide proof of the policy as requested by Plaintiff in writing. Id. ¶¶ 9, 12.  
26 Plaintiffs also allege Ocwen transferred the servicing rights for the loan to Defendant  
27 Nationstar who provided Plaintiffs with a payment history detailing unwarranted PMI  
28 policy charges. Id. ¶ 17.

1 On June 10, 2015, Defendant Nationstar and Defendant Ocwen filed separate  
2 motions to dismiss. Plaintiffs filed oppositions to the motions and Defendants filed  
3 replies. After a thorough review of the parties' submissions, the Court GRANTS  
4 Defendants' motions to dismiss.

## DISCUSSION

6 Defendant Nationstar moves to dismiss the complaint pursuant to Federal Rule of  
7 Civil Procedure 12(b)(6) arguing Plaintiffs fail to meet the heightened pleading standard  
8 of Rule 9(b) of the Federal Rules of Civil Procedure.

9 Defendant Ocwen contends Plaintiffs' claims are time-barred and are not alleged  
10 with the specificity required by Rule 9(b) and, therefore should be dismissed pursuant to  
11 Rule 12(b)(6).

12 || I. Legal Standards

13 || A. 12(b)(6)

14 Rule 12(b)(6) tests the sufficiency of the complaint. Navarro v. Block, 250 F.3d  
15 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule 12(b)(6) where the  
16 complaint lacks a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749  
17 F.2d 530, 534 (9th Cir. 1984); see Neitzke v. Williams, 490 U.S. 319, 326 (1989) (“Rule  
18 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law.”).  
19 Alternatively, a complaint may be dismissed where it presents a cognizable legal theory yet  
20 fails to plead essential facts under that theory. Robertson, 749 F.2d at 534. While a  
21 plaintiff need not give “detailed factual allegations,” he must plead sufficient facts that,  
22 if true, “raise a right to relief above the speculative level.” Bell Atlantic Corp. v. Twombly,  
23 550 U.S. 544, 545 (2007).

24 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
25 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,  
26 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 547). A claim is facially  
27 plausible when the factual allegations permit “the court to draw the reasonable inference  
28 that the defendant is liable for the misconduct alleged.” Id. In other words, “the non-

1 conclusory ‘factual content,’ and reasonable inferences from that content, must be  
 2 plausibly suggestive of a claim entitling the plaintiff to relief. Moss v. U.S. Secret Service,  
 3 572 F.3d 962, 969 (9th Cir. 2009). “Determining whether a complaint states a plausible  
 4 claim for relief will … be a context-specific task that requires the reviewing court to draw  
 5 on its judicial experience and common sense.” Iqbal, 556 U.S. at 679.

6       In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the  
 7 truth of all factual allegations and must construe all inferences from them in the light most  
 8 favorable to the nonmoving party. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir.  
 9 2002); Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). However,  
 10 legal conclusions need not be taken as true merely because they are cast in the form of  
 11 factual allegations. Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir. 2003); Western  
 12 Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). When ruling on a motion  
 13 to dismiss, the Court may consider the facts alleged in the complaint, documents attached  
 14 to the complaint, documents relied upon but not attached to the complaint when  
 15 authenticity is not contested, and matters of which the Court takes judicial notice. Lee  
 16 v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). If a court determines that  
 17 a complaint fails to state a claim, the court should grant leave to amend unless it  
 18 determines that the pleading could not possibly be cured by the allegation of other facts.  
 19 See Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995).

20 **B. 9(b)**

21       Under Rule 9(b) of the Federal Rules of Civil Procedure, “[i]n alleging fraud or  
 22 mistake, a party must state with particularity the circumstances constituting fraud or  
 23 mistake.” Under Ninth Circuit case law, Rule 9(b) imposes two distinct requirements on  
 24 complaints alleging fraud. First, the basic notice requirements of Rule 9(b) require  
 25 complaints pleading fraud to “state precisely the time, place, and nature of the misleading  
 26 statements, misrepresentations, or specific acts of fraud.” Kaplan v. Rose, 49 F.3d 1363,  
 27 1370 (9th Cir. 1994); Vess v. Ciba-Geigy Corp., U.S.A., 317 F.3d 1097, 1106 (9th Cir.  
 28 2003) (A plaintiff must set forth “the who, what, when, where and how” of the alleged

1 misconduct.”). Second, the Rule requires that the complaint “set forth an explanation as  
 2 to why the statement or omission complained of was false and misleading.” Yourish v.  
 3 California Amplifier, 191 F.3d 983, 993 (9th Cir. 1999).

4 **II. Defendant Nationstar**

5 Defendant Nationstar contends Plaintiffs’ claims rest on allegations that Nationstar  
 6 engaged in fraud and misrepresentation by assessing unwarranted PMI payments on  
 7 Plaintiffs’ mortgage account, but Plaintiffs fail to allege the fraud with the requisite  
 8 particularity of Rule 9(b). Defendant maintains, as an initial matter, the Deed of Trust,  
 9 which sets forth provisions permitting mortgage insurance to be maintained in connection  
 10 with the loan, demonstrates Plaintiffs’ assertion that neither the loan nor the Deed of  
 11 Trust demonstrate the existence of a PMI policy is without merit.<sup>1</sup> Defendant also argues  
 12 Plaintiffs do not provide specifics of the misrepresentations allegedly made by Nationstar,  
 13 or that Nationstar knew the misrepresentations were false. While Plaintiffs allege the  
 14 “affirmative misrepresentations were made knowingly by NATIONSTAR through their  
 15 customer service representatives,” they have provided no specifics about who they spoke  
 16 with, when they spoke with the individuals and their authority to speak on behalf of  
 17 Nationstar. Motion at 4 (Doc. No. 5) (citing Complaint ¶ 31, 44).

18 In opposition, Plaintiffs argue the Deed of Trust merely permits the possibility of  
 19 requiring mortgage insurance at the inception of the loan not that a PMI policy actually  
 20 existed or was required by the lender when the loan was created. Plaintiffs also contend

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21 <sup>1</sup>In support of its motion, Defendant Nationstar asks the Court to take judicial  
 22 notice of (1) the Deed of Trust recorded in the San Diego County Recorder’s Office on  
 23 January 18, 2008 as instrument number 2008-002550; (2) an Assignment of Deed of  
 24 Trust recorded in the San Diego County Recorder’s Office on February 22, 2010 as  
 25 instrument number 2010-0085135; (3) a Corporate Assignment of Deed of Trust recorded  
 26 in the San Diego County Recorder’s Office on June 7, 2013 as instrument number 2013-  
 27 0360339; (4) a Notice of Default recorded in the San Diego Recorder’s Office on  
 28 December 29, 2009 as instrument number 2009-0717815; (5) a Notice of Default  
 recorded in the San Diego Recorder’s Office on August 22, 2013 as instrument number  
 2013-0525064, (6) a Notice of Default recorded in the San Diego Recorder’s Office on  
 March 14, 2014 as instrument number 2014-0101131; and (7) a Notice of Default  
 recorded in the San Diego Recorder’s Office on March 28, 2014 as instrument number  
 2014-0122378. The Court finds these documents are “capable of accurate and ready  
 determination by resort to sources whose accuracy cannot reasonably be questioned” and  
 takes judicial notice of them pursuant to Rule 201 of the Federal Rules of Evidence.

1 Defendant cannot prevail on its motion to dismiss based upon the allegations of the  
 2 complaint.

3       In reply, Defendant argues Plaintiffs fail to plead intent to defraud and make only  
 4 vague allegations that Nationstar, through its customer service representative, made  
 5 affirmative misrepresentations knowing they were false.<sup>2</sup> Defendant further argues  
 6 Plaintiffs do not specify who the customer representatives are, their authority to speak, or  
 7 when these representations were made. Defendant maintains Plaintiffs allege the PMI  
 8 began being wrongfully charged in 2010 when Ocwen serviced the Loan. Defendant  
 9 argues, assuming, arguendo, Plaintiffs are correct, then that information was already in the  
 10 system when the loan service transferred to Nationstar, and, therefore, all Plaintiffs allege  
 11 against Nationstar is that it continued to bill them for PMI based on the information  
 12 received at the time of the service transfer. Defendant contends there are no facts to show  
 13 that Nationstar intentionally decided to charge PMI when it was not contractually allowed  
 14 just to take extra money from the Plaintiffs. Defendant also maintains that, contrary to  
 15 Plaintiffs allegation that the “Deed of Trust does not demonstrate the existence of a PMI  
 16 policy,” the Deed of Trust permits mortgage insurance to be placed on the loan.

17       In the complaint, Plaintiffs Defendant Ocwen transferred the loan servicing rights  
 18 to Defendant Nationstar on or about May 16, 2013, and on or about June 14, 2013,  
 19 Plaintiffs sent a written request to Nationstar for payment records. Complaint ¶¶ 16, 17.  
 20 In response, Defendant Nationstar provided Plaintiffs with a payment history detailing  
 21 allegedly unwarranted PMI policy charges that resulted in an inflated escrow balance on  
 22 July 1, 2013. Id. ¶ 17. They further allege “by way of billings,” Defendant Nationstar  
 23 claimed the loan contained a PMI policy, claimed Plaintiffs owed payments toward a  
 24 nonexistent PMI policy, and claimed funds paid were being applied to a PMI policy. Id.  
 25 ¶¶ 32, 45. Plaintiffs assert Defendant intended them to rely on the misrepresentations by  
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27       <sup>2</sup>Defendant also argues in its reply brief that the action is time-barred. The Court  
 28 will not consider this argument brought for the first time in Defendant’s reply brief. See  
Zamani v. Carnes, 491 F.3d 990 (9th Cir. 2007) (citing Koerner v. Grigas, 328 F.3d 1039,  
 1048 (9th Cir. 2003).

1 repeatedly submitting billing statements that indicated a due and owing balance attributed  
 2 to the PMI policy and Plaintiffs relied on the misrepresentations because Nationstar was  
 3 a reputable mortgage servicer. Id., ¶¶ 33, 46, 47. They further allege they were damaged  
 4 by incurring court fees, suffered slander due to the illegitimate foreclosure proceedings and  
 5 were reported to credit reporting agencies. Id. ¶48.

6 While Plaintiffs provide specific dates as to the transfer of the servicing rights and  
 7 the initial correspondence regarding payment records, they only generally allege  
 8 misrepresentations “by way of billings” and “through their customer service  
 9 representatives.” These allegations fail to state precisely the time and place of the specific  
 10 acts of fraud and misrepresentation, and, therefore, Plaintiffs do not plead fraud and  
 11 misrepresentations with the particularity required by Rule 9(b).

### 12 III. Defendant Ocwen

#### 13 A. Statute of Limitations

14 Defendant Ocwen argues Plaintiffs’ claims are barred by the statute of limitations.  
 15 Defendant maintains Plaintiffs’ fraud and misrepresentation claims have an applicable  
 16 statute of limitations of three years, and Plaintiffs did not commence this lawsuit until two  
 17 years after their claims expired. Defendant contends the entire lawsuit arises from the  
 18 purported payments made to a non-existent PMI policy which caused their loan balance  
 19 to fluctuate and their escrow payments to increase, and Plaintiffs allege they made these  
 20 payments from February 2010 to December 2010. Thus, Defendant argues, all claims  
 21 filed after December 2013, or at the very latest March/April 2014, are time-barred.

22 Defendant Ocwen also argues even if the discovery rule postponed the accrual of  
 23 the claims, the claims are still time-barred because Plaintiffs were aware of the purported  
 24 fraud/misrepresentations in March 2011 or April 2011 when they received the bank  
 25 statements showing fluctuations in the loan balance. Furthermore, Defendant argues, the  
 26 complaint fails to allege any facts regarding the time and manner of Plaintiffs’ discovery  
 27 of the purported fraud/misrepresentation, and even if it did, such allegations would be  
 28 inconsistent and defeated by the allegations of the complaint.

1 Plaintiffs argue the statute of limitation began to run when Plaintiffs discovered the  
2 existence of their claims. Although Defendant argues they were aware of the fraud in  
3 March 2011, Plaintiffs contend no facts in the complaint indicate such awareness. At that  
4 time, they maintain they simply knew their payments had increased. Plaintiffs further  
5 maintain they were not aware that Defendant had committed any fraud or  
6 misrepresentations until “sometime in late 2012,” after Defendant failed to respond to  
7 their June 12, 2012 correspondence requesting a copy of the PMI policy.

8 In reply, Defendant contends Plaintiffs erroneously argue the statute of limitations  
9 began to run when they discovered the existence of their claims. Defendant further  
10 contends Plaintiffs’ arguments are disingenuous and inconsistent with the allegations of  
11 the complaint. Defendant maintains Plaintiffs did not allege any facts regarding the time  
12 and manner of their discovery of the purported fraud/misrepresentation or their inability  
13 to discover the purported fraud prior to June 12, 2012, despite reasonable diligence, and  
14 therefore, cannot rely on the discovery rule. Defendant further maintains Plaintiffs’ claims  
15 would still be time-barred even if the discovery rule applied because their allegations  
16 indicate they were aware of the purported fraud when they discovered their escrow  
17 payments increased in 2010 and 2011 as a result of the illegitimate PMI policy. At the  
18 very least, Defendant argues, Plaintiffs allegations indicate they were aware of the  
19 purported misrepresented loan balances when they received their bank statements in  
20 March 1, 2011. Defendant maintains it is obvious Plaintiffs were fully aware of the  
21 “non-existent” and “illegitimate” PMI policy well before June 12, 2012.

22 Under California law, the statute of limitations for fraud and misrepresentation is  
23 three years, and does not accrue until the aggrieved party discovers the facts constituting  
24 the fraud. Cal. Code Civ. P. § 338(d). The discovery rule “postpones accrual of a cause  
25 of action until the plaintiff discovers, or has reason to discover, the cause of action.” Fox  
26 v. Ethicon Endo-Surgery, Inc., 35 Cal.4th 797, 807 (2005). To survive a motion to dismiss  
27 pursuant to the discovery rule, “a plaintiff whose complaint shows on its face that his  
28 claim would be barred without the benefit of the discovery rule must specifically plead

1 facts to show (1) the time and manner of discovery and (2) the inability to have made  
 2 earlier discovery despite reasonable diligence.” *Id.* at 808 (quoting McKelvey v. Boeing  
 3 North American, Inc., 74 Cal.app.4th 151 (1999)). Plaintiffs bears the burden of showing  
 4 reasonable diligence.

5 According to the allegations of the complaint, Defendant Ocwen allocated payments  
 6 towards the nonexistent PMI policy from February 2010 through December 2010.  
 7 Complaint ¶ 9. Plaintiffs further allege their loan statements reflected fluctuated balances  
 8 in March 2011. *Id.* ¶ 11. Unless the discovery rule applies, Plaintiffs’ complaint filed more  
 9 than three years after March 2011, is time-barred.

10 The complaint fails to allege any facts showing the time and manner in which  
 11 Plaintiffs discovered the fraud and their inability to have made the discovery earlier. The  
 12 Court finds, as alleged, the complaint is time-barred.

13 **B. Remaining ground**

14 Because the Court finds the complaint is time-barred as to Defendant Ocwen, it will  
 15 not address the remaining ground for dismissal.

16 **III. Leave to Amend**

17 Both Defendants seek dismissal of the action with prejudice arguing amendment  
 18 is futile. The Court disagrees. Plaintiffs may amend their complaint to cure the  
 19 deficiencies noted.

20 **CONCLUSION AND ORDER**

21 Based on the foregoing, IT IS HEREBY ORDERED:

- 22 1. Defendant Nationstar’s motion to dismiss is **GRANTED**;
- 23 2. Defendant Ocwen’s motion to dismiss is **GRANTED**;
- 24 3. Plaintiffs’ complaint is dismissed in its entirety. Plaintiffs may file a First

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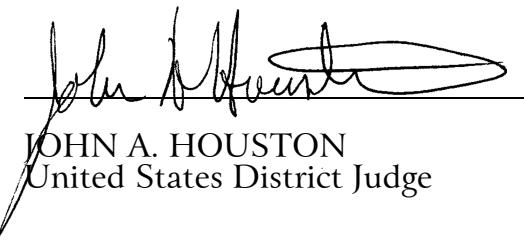
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1 Amended Complaint addressing the deficiencies noted above on or before  
2 May 16, 2016.

3 Dated: March 31, 2016

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5 JOHN A. HOUSTON  
6 United States District Judge

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